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No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS,
COPPIN STATE COLLEGE,

Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding that limitation periods under state statutes establishing administrative procedures for employee complaints of discriminatory discharge are not the most analogous statutes of limitations to apply to federal district court actions to enforce public employee rights under 42 U.S.C. § 1983?

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SUMMARY OF ARGUMENT

1. Contrary to petitioners' contention, the Court of Appeals *did* consider the legislative policies behind Md. Code, Articles 49B and 64A, and correctly determined that the Maryland legislature would not have intended to apply the administrative limitations periods of these statutes to public employee discharge suits under 42 U.S.C. § 1983.

2. Assuming *arguendo* that the Court of Appeals incorrectly determined the question of legislative intent, nevertheless certiorari should be denied, because it would be fundamentally inconsistent with the policies behind 42 U.S.C. § 1983 to allow these administrative limitations periods to govern such lawsuits.

3. Consistency among the circuits on the fundamental issue of the most analogous statute of limitations is both unnecessary and impossible.

For these reasons, the petition for certiorari should be denied.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MARYLAND LEGISLATURE WOULD NOT INTEND THE LIMITATIONS PERIODS OF MARYLAND CODE, ARTICLES 49B AND 64A, TO GOVERN FEDERAL CIVIL ACTIONS UNDER THE RECONSTRUCTION CIVIL RIGHTS ACTS.

The only issue presented by this petition is whether the Court of Appeals correctly determined that the limitations periods of Maryland Code, Articles 49B and 64A, should not govern federal civil actions under the Reconstruction Civil Rights Acts.[1] The Court of Appeals correctly determined that the Maryland legislature would not intend the limitations periods of Articles 49B or 64A to apply to civil actions under § 1983.[2]

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[1] Respondents adopt petitioners' nomenclature, and will henceforth refer generically to all claims under the Reconstruction Civil Rights Acts as "§ 1983 claims."

[2] Any discussion in petitioners' memorandum pertaining to the equitable doctrine of laches and of the writ of mandamus in the Maryland courts is totally immaterial. The question is whether the Maryland legislature would apply the limitations periods of Articles 49B or 64A to § 1983 lawsuits. The issue

First, the Court of Appeals adopted the reasoning of *McNutt v. Duke Precision Dental and Orthodontic Laboratories*, 698 F.2d 676 (4th Cir. 1983), in rejecting Article 49B as the most analogous statute. *Grattan v. Burnett*, 710 F.2d 160 at 162 (4th Cir. 1983). In *McNutt*, the Fourth Circuit determined that it was unlikely the Maryland legislature intended a statute which was designed to initiate an informal, investigatory administrative proceeding to govern the timeliness of a lawsuit. As noted in *McNutt:*

> The Court of Appeals of Maryland has observed that the filing of a complaint with Maryland's Human Relations Commission "merely triggers the investigative process." *Banach v. State Commission on Human Relations*, 277 Md. 502, 356 A.2d 242, 249 (1976). The court added that the Legislature "assumed that the [post-filing] investigative process would flesh out the charges made by the individual before the respondent was initially called upon to answer them." *Id.*, 356 A.2d at 250. A relatively short limitations period was clearly thought by the Maryland Legislature as appropriate to such an administrative proceeding, but it does not appear appropriate for application to a judicial proceeding in which the investigatory phase must precede the filing of the complaint.
>
> Moreover, the enforcement schemes contemplated by Maryland's Article 49B and 42 U.S.C.A. § 1981 are completely different. Maryland's administrative proceeding is designed primarily to "eliminate the discrimination by conference, conciliation, and persuasion." See Article 49B, § 10(b) (1982 Cum. Supp.). If a process of conference, conciliation and persuasion is to be effective, claims must be fresh. The older they are the less the likelihood of successful administrative adjustment.

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therefore is one of legislative intent. Common law doctrines are simply immaterial to the analysis of the issue, as they provide no insight into the fundamental issue of which statute of limitations governs this action.

> In 42 U.S.C.A. § 1981, of course, there is no such conciliation scheme or purpose. It is simply a machine for adversarial enforcement of rights secured by federal law. . . . There is a strong policy against judicial assertion of stale claims, but statutes of limitations clearly applicable to judicial assertion of claims generally contain much longer periods than do those applicable to administrative proceedings where a primary objective is conciliation and attaining voluntary compliance.

McNutt v. Duke Precision Dental and Orthodontic Lab., supra, 698 F.2d at 678, 679.[3]

Similarly, as noted in *Grattan v. Burnett, supra,* 710 F.2d at 162-163:

> We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in *McNutt.* A proceeding under Article 64A is an administrative proceeding and the largest part of it — 130 of the total of 165 days — is spent formally adjudicating a claim initiated by the state. That the Maryland legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof hardly evidences an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel

[3] Although the opinion does not explicitly discuss the point, a further indication of the legislature's intent not to apply Article 49B's limitations period to litigation is apparent from the fact that, except in very limited circumstances, Article 49B does not provide for a private right of action. Article 49B § 10(d), at App. 7, Petition for Writ of Certiorari (hereinafter, "Petition"). Employees can presently seek judicial review only of denials of requests for reconsideration of no probable cause findings, and only if the EEOC does not have jurisdiction over the subject matter of the complaint. At the time this lawsuit was filed, Article 49B contained no provision allowing an aggrieved complainant to initiate any form of judicial review.

> who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code, Article 49B, § 7(b)(1). This, too, indicates that the Maryland legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination.

Petitioners' footnote 9, Petition at 13, seriously misstates the Court of Appeal's position on this issue, and assumes a position inconsistent with the basic thrust of petitioners' argument. It is true that, under COMAR 06.01.03.05, unclassified employees bear the burden of proof in discharge cases. But petitioners elsewhere argue that it is immaterial that respondents are not merit system employees and that Article 64A is therefore not available to them at all. Petition, n. 12 at 19. As a general proposition, the Court of Appeals is correct on the burden of proof issue. If petitioners' are suggesting that the limitations period should vary depending on who had the initial burden of proof, then respondents are equally correct in asserting that time limitations contained in a statutory scheme which isn't even available to these respondents should not govern this action. Petitioners simply cannot have it both ways. As a matter of federal policy, all public employees should be governed by the *same* statute of limitations, irrespective of which statute that may be. Therefore, the Court of Appeal's position on the burden of proof is well taken.

Second, the Court of Appeals nowhere intimates that a public employee can file a discrimination complaint "without regard" to Article 64A. The court simply, and correctly, noted that a public employee is free to file a discrimination complaint after the expiration of 165 days. This is because Article 49B § 9(a) allows for a six month

filing period. As this period exceeds the 165 day period in Article 64A, a public employee who exhausted his/her administrative remedies under Article 64A would still have at least 15 days in which to file a discrimination complaint under Article 49B. This suggests that the legislature did not intend to limit a public employee's right to sue for unlawful discrimination to 165 days.[4]

Contrary to petitioners' argument, the Court of Appeals *did* analyze the legislative policies of Articles 49B and 64A, and correctly determined that the Maryland legislature would not have applied these time limits to a § 1983 action.

II.

THE POLICIES BEHIND § 1983 ARE INCONSISTENT WITH THE POLICIES BEHIND THE LIMITATIONS PERIODS OF MD. CODE, ARTICLES 49B AND 64A.

Assuming *arguendo* that the Court of Appeals determined incorrectly that the Maryland legislature would not have intended Articles 49B and 64A to govern the limitations periods for § 1983 actions, nevertheless the decision is correct because the policies behind § 1983 are inconsistent with the policies of the state statutes.[5]

This Court held only last year that state public employees are not required to exhaust state administrative remedies prior to filing a federal § 1983 action. *Patsy v. Florida Board of Regents*, ___ U.S. ___, 102 S. Ct.

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[4] Similarly, Md. Rule of Procedure B4 allows only for *appellate* judicial review of an Article 64A decision. The decision is on the record, and based on substantial evidence. It is likely that the Maryland legislature would view Rule B4 as an inadequate substitute for jury trial.

[5] Certiorari should be denied if the decision of the lower court is correct, even if the rationale for the decision is incorrect. R. Stern and E. Gressman, Supreme Court Practice (5th Ed. 1978) at 272.

2557, 73 L. Ed. 2d 172 (1982). In doing so, the Court articulated three factors behind § 1983 which would be inconsistent with utilizing the very short administrative limitations periods of Articles 49B and 64A in § 1983 actions. First, the 1871 Congress had determined that the federal courts had a paramount role in protecting constitutional rights. Second, the 1871 Congress expressed its belief that state authorities had been unwilling or unable to protect the constitutional rights of individuals or to punish those who violated these rights. Finally, the 1871 Cogress had viewed § 1983 as providing dual or concurrent forums in the state and federal systems, enabling the plaintiff to choose the forum in which to seek relief. Therefore, a plaintiff need not first invoke a state remedy before invoking the federal remedy.

All three factors strongly militate against applying the very short administrative limitations periods of Articles 49B and 64A to § 1983 actions. If Congress did not intend that § 1983 public employee plaintiffs exhaust state administrative remedies, then surely Congress did not intend that the limitations periods designed to invoke these administrative procedures should nevertheless govern the filing of the federal suit.

III.

CONSISTENCY AMONG THE CIRCUITS IS NEITHER NECESSARY NOR POSSIBLE ON THE FUNDAMENTAL ISSUE OF THE MOST ANALOGOUS STATUTE OF LIMITATIONS.

Petitioners are incorrect in their suggestion that there is a deep division between the circuits on the question presented herein. In fact, a close examination of the cases relied on by petitioners in Part II of their Petition reveals that the First Circuit is alone in allowing state administrative statutes of limitations to govern § 1983 actions. All the other cases cited by petitioner involve a determination as to which *litigation* statute of limitations

period should be applied to § 1983 actions, and, in the final analysis, consistency among the circuits is neither necessary, nor possible, on the fundamental issue of which such statute of limitations is most analogous. Congress has made the policy determination that state statutes of limitation are to govern § 1983 actions. As no two statutes of limitations are identical in all respects, inconsistency among the circuits (and, indeed, within the circuits), is inevitable.

One example of this inevitable inconsistency is the difference between the statutes at issue in the instant case, and the statute at issue in *Springfield Township School District v. Madelin H. Knoll*, petition for cert. filed, No. 82-1889. In the instant case, the two statutes of limitations involve the invocation of administrative procedures. Article 49B is available to all employees, but contains provisions allowing employees to seek limited judicial review of denials of requests for reconsideration of no probable cause findings only if the EEOC does not have jurisdiction over the subject matter of the complaint. Article 64A is available only to *some* public employees, but does contain appellate judicial review for those employees. The statute at issue in *Knoll* requires *all* individuals to file suit against public officials within six months. By its terms, it is not limited to the employment context, and obviously pertains directly to the initial invocation of trial court litigation. Given the differences between these statutes, it would be impossible for this Court to fashion a general rule of universal applicability even if the Court were to accept both cases.[6] Unless this Court is prepared to grant certiorari in at least fifty such cases, the Court should deny certiorari in this case.

[6] Petitioners also concede the inherently local nature of limitations issues. "No one case could resolve all of the possible limitations issues that could arise in a federal court action under 42 U.S.C. § 1983." Petition, at 22.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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